

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

LT. COL JOSEPH L. BUNECKE, UNITED  
STATES AIR FORCE, RETIRED,

Plaintiff,

vs.

UNITED STATES AIR FORCE ACADEMY,  
and UNITED STATES DEPARTMENT OF  
THE AIR FORCE.

Defendants.

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**COMPLAINT FOR INJUNCTIVE RELIEF**

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For his complaint against the United States Air Force Academy (the “USAFA”) and the United States Department of the Air Force (“USAF”), Plaintiff, Lieutenant Colonel Joseph L. Bunecke, USAF, Retired (“Lt. Col. (Ret.) Bunecke”), by and through undersigned counsel, alleges as follows:

1. This is a civil action brought pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking an order enjoining the USAFA and the USAF from improperly withholding agency records and compelling the production of all requested agency records.

2. The agency records in question relate to two separate FOIA requests submitted by Lt. Col. (Ret.) Bunecke to the USAFA and the USAF. In summary, the FOIA requests sought the disclosure of agency records regarding the USAFA’s and the USAF’s investigation and adjudication of sexual assault complaints submitted by cadets while matriculating at the USAFA. The USAFA’s and the USAF’s treatment of such complaints have received widespread publicity, with various news media outlets reporting on the issue in recent years.

3. For the past four years, the USAFA and the USAF have deliberately avoided their public disclosure obligations under FOIA to produce the agency records requested by Lt. Col. (Ret.) Bunecke. Unfortunately, this is not an isolated instance of abuse. The USAFA and the USAF have long engaged in tactics aimed at frustrating the public disclosure of agency records through FOIA that may potentially be damaging to the reputation of the USAFA. As the Supreme Court for the United States has recognized, however, “the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L.Ed.2d 159 (1978). The public has a compelling interest in the disclosure of agency records relating to complaints of sexual assault alleged to have occurred on the campus of the USAFA, which are currently being improperly withheld by the USAFA and the USAF without justification under FOIA.

### **PARTIES**

4. Plaintiff Lt. Col. (Ret.) Bunecke is a 1978 graduate of the USAFA and a retired Lieutenant Colonel. Lt. Col. (Ret.) Bunecke served in the USAF for 21 years. For four years, from 1987 through 1991, Lt. Col. (Ret.) Bunecke served as the Executive Officer of the Department of Behavioral Sciences and Leadership and as an Assistant Professor within the faculty of the USAFA. Lt. Col. (Ret.) Bunecke currently resides in Colorado Springs, Colorado.

5. Defendant USAFA is a military educational institution and an agency of the United States of America as defined in 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). The USAFA is an agency with possession and control of the requested agency records and is responsible for producing such agency records pursuant to FOIA.

6. Defendant USAF is a military branch of the Department of Defense and an agency of the United States of America as defined in 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1).

The USAF is an agency with possession and control of the requested agency records and is responsible for producing such agency records pursuant to FOIA.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331, 1361, and 5 U.S.C. § 552(a)(4)(B).

8. Lt. Col. (Ret.) Bunecke exhausted all administrative remedies in accordance with 5 U.S.C. § 552(a)(6)(C)(i).

9. Venue for this civil action lies in the United States District Court for the District of Colorado pursuant to 5 U.S.C. § 552(a)(4)(B).

### **STATEMENT OF FACTS**

#### **I. The 2015 FOIA Request**

10. On July 21, 2015, Lt. Col. (Ret.) Bunecke submitted a FOIA request to the USAFA (the “2015 FOIA Request”). The 2015 FOIA Request sought the public disclosure of documents and information in the USAFA’s and the USAF’s custody and possession regarding a complaint submitted by a cadet alleging a sexual assault that occurred in January 2013 on the campus of the USAFA. In addition, the 2015 FOIA Request more broadly sought documents and information regarding procedures, processes, training programs, and protocols governing the USAFA’s investigation and adjudication of complaints of sexual assault that allegedly occurred on the campus of the USAFA. A true and correct copy of the 2015 FOIA Request is appended hereto as Exhibit A.

11. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the statutory deadline for the USAFA to respond to the 2015 FOIA Request was August 18, 2015.

12. On August 10, 2015, the USAFA acknowledge receipt of the 2015 FOIA Request and assigned FOIA tracking number 2015-05337-F to the request. The acknowledgement also

advised Lt. Col. (Ret.) Bunecke that the USAFA referred the 2015 FOIA Request to the Air Force Office of Special Investigations (the “AF OSI”) for review.

13. Notwithstanding the USAFA’s notice referring the 2015 FOIA Request to the AF OSI, the USAFA apparently continued to process the request. On December 11, 2015, Charles M. Springs, FOIA Officer for the USAFA, emailed Lt. Col. (Ret.) Bunecke stating that, due to an office relocation between September 2015 and November 2015, the USAFA was unable to process the 2015 FOIA Request. Mr. Springs advised that the USAFA would “re-open [the] case and request those records that may have been in USAFA’s control.”

14. On March 17, 2016, the USAFA requested that Lt. Col. (Ret.) Bunecke clarify the scope of the 2015 FOIA Request to expedite the production of agency records. In response, Lt. Col. (Ret.) Bunecke agreed to clarify the scope of the 2015 FOIA Request to facilitate a timely response, and intended to do so promptly. Notwithstanding, on March 31, 2016, the USAFA informed Lt. Col. (Ret.) Bunecke that the USAFA decided to close the 2015 FOIA Request, effective April 1, 2016, pending receipt of a revised FOIA request. The USAFA did not produce any agency records in response to the 2015 FOIA Request. Importantly, Lt. Col. (Ret.) Bunecke did not consent to the USAFA’s decision to close the 2015 FOIA Request. A true and correct copy of the USAFA letter closing the 2015 FOIA Request is appended hereto as Exhibit B.

## **II. The 2016 FOIA Request**

15. On April 5, 2016, Lt. Col. (Ret.) Bunecke submitted a revised FOIA request to the USAFA (the “2016 FOIA Request”). The purpose of the 2016 FOIA Request was to further clarify the agency records requested in the 2015 FOIA Request.

16. The 2016 FOIA Request requested the public disclosure of documents and information in the USAFA’s and the USAF’s custody and possession from January 2013 to the date of the request. Specifically, the 2016 FOIA Request sought the disclosure of: (i) regulations,

policies, procedures, and guidelines relating to the USAFA's receipt, investigation, and adjudication of complaints of sexual assault that allegedly occurred on the campus of the USAFA; (ii) a copy of the USAFA Sexual Assault Prevention and Response Strategic Plan; (iii) regulations, policies, procedures, and guidelines applicable to cadets' access to firearms generally on the campus of the USAFA, and also when a cadet is suspected of an offense or is under investigation by the USAFA for an alleged sexual assault; (iv) reports generated by the USAFA, such as the Military Service Academy Report to Congress and Office of the Inspector General reports, regarding or relating to the investigation of sexual assault complaints and threats of violence at the USAFA; and (v) all sexual assault surveys and responses, as well as any recommendations made by the USAFA resulting from such surveys. A true and correct copy of the 2016 FOIA Request is appended hereto as Exhibit C.

17. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the statutory deadline for the USAFA to respond to the 2016 FOIA Request was May 3, 2016.

18. Nearly a year later, on March 13, 2017, the USAFA provided its first incremental installment production in response to the 2016 FOIA Request. The USAFA produced approximately 384 pages of documents purportedly responsive to certain categories of agency records sought in the 2016 FOIA Request.

19. On April 14, 2017, the USAFA provided its "final response and final installment" to the 2016 FOIA Request. The USAFA produced approximately 1,307 pages of documents purportedly responsive to certain categories of agency records sought in the 2016 FOIA Request. In addition, the USAFA referred Lt. Col. (Ret.) Bunecke to information posted on an internet website purportedly responsive to another category of agency records sought by the 2016 FOIA Request. The April 14, 2017 response, however, was incomplete and included a mere re-production of the documents produced with the first installment on March 13, 2017, as well as

other miscellaneous documents. The USAFA's April 14, 2017 letter is appended hereto as Exhibit D.

20. Referring to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)) and FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), the USAFA claimed that information contained in the produced agency records was "considered privileged in litigation, primarily under the deliberative process privilege and personal information in other files that, if disclosed, would result in a clearly unwarranted invasion of personal privacy." Accordingly, the agency records produced by the USAFA were either substantially redacted or altogether withheld. For example, the USAFA improperly relied on FOIA Exemption 6 to redact the names of government officials within produced email correspondence. The USAFA also failed to provide any explanation as to the general nature of the agency records withheld, or the specific grounds upon which the USAFA applied an exemption under FOIA. Finally, the USAFA redacted entire pages of documents without attempting to conduct a line-by-line analysis to determine whether a partial release was appropriate.

21. More importantly, the USAFA's productions on March 13, 2017 and April 14, 2017 failed to disclose numerous agency records in its custody and possession responsive to the 2016 FOIA Request. Such agency records include, but are not limited to:

- a. The syllabus for the Air Officer Commanding ("AOC") Master's course, including the curriculum for courses taken by new AOCs;
- b. Regulations, policies, procedures, and guidelines governing cadets' access to firearms and the changes to these policies in sexual assault cases alleged to have occurred on the campus of the USAFA;
- c. Regulations, policies, procedures, and guidelines regarding the USAFA's enforcement of No Contact Orders on the campus of the USAFA; and

d. Internal and external email correspondence related to the agency records described above, including communications between the USAFA and USAF Headquarters regarding complaints of sexual assault that have the potential to receive widespread publicity.

22. The USAFA's April 14, 2017 "final response and final installment" letter advised Lt. Col. (Ret.) Bunecke of his right to appeal the decision "within 90 days of the date of [the] letter."

### **III. Appeal of the USAFA's Response to the 2016 FOIA Request**

23. On June 22, 2017, Lt. Col. (Ret.) Bunecke submitted an administrative appeal to the USAFA in response to the USAFA's April 14, 2017 "final response and final installment" letter (the "FOIA Appeal"). Lt. Col. (Ret.) Bunecke timely submitted the FOIA Appeal in accordance with the USAFA's instructions and consistent with 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). A true and correct copy of the FOIA Appeal is appended hereto as Exhibit E.

24. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), the statutory deadline for the USAFA to respond to the FOIA Appeal was July 20, 2017.

25. The USAFA acknowledged receipt of the FOIA Appeal over a month later, on July 26, 2017 (*i.e.*, after the statutory deadline). The acknowledgment letter informed Lt. Col. (Ret.) Bunecke that the USAFA would either respond with a final determination concerning the FOIA Appeal, or refer the FOIA Appeal to the USAF's appellate authority. The USAFA assigned the FOIA Appeal reference number 2017-00131-A.

26. After several months without a response, on November 27, 2017, Lt. Col. (Ret.) Bunecke sent a follow-up letter to the USAFA regarding the status of the FOIA Appeal. Notably, Lt. Col. (Ret.) Bunecke's letter to the USAFA appended a memorandum from the USAFA's Board of Visitors sent to Protect our Defenders (the "BOV Memorandum"), an

organization who seeks to increase awareness and prevent sexual assaults in the military. The BOV Memorandum described the existence of agency records in the USAFA's and the USAF's custody and possession that were responsive to the 2015 FOIA Request and the 2016 FOIA Request. For example, the BOV Memorandum described agency records regarding the USAFA's creation and implementation of the Sexual Assault Prevention and Response ("SAPR") office, including "Superintendent-led monthly reviews of all sexual assault cases." The BOV Memorandum also referred to agency records relevant to other USAFA initiatives designed to investigate and prevent sexual assaults on the campus of the USAFA. Finally, the BOV Memorandum asserted that AOCs attend an "intensive one-year (three semesters), 45-credit hour accredited master's degree program in Counseling and Leadership prior to assuming command of his/her squadron." The agency records referenced in the BOV Memorandum have not been produced to Lt. Col. (Ret.) Bunecke by the USAFA. A true and correct copy of Lt. Col. (Ret.) Bunecke's November 27, 2017 letter, which includes the BOV Memorandum, is appended hereto as Exhibit F.

27. It is noteworthy that the BOV Memorandum also alludes to the fact that the Superintendent of the USAFA routinely coordinates with other entities within the USAFA and the USAF following receipt of a complaint of sexual assault occurring on the campus of the USAFA. Upon information and belief, these entities include the Office of the Secretary of Defense, the Office of the Secretary of the Air Force, the Chief of Staff of the Air Force, the Air Force Office of Special Investigations, and the Air Force Office of the Inspector General. Any agency records reflecting coordination between the USAFA and these entities, such as email communications or memoranda, are responsive to the 2016 FOIA Request. These agency records have not been produced to Lt. Col. (Ret.) Bunecke by the USAFA.



28. The USAFA did not respond to Lt. Col. (Ret.) Bunecke's November 27, 2017 letter regarding the FOIA Appeal.

29. On March 8, 2018, the USAFA notified Lt. Col. (Ret.) Bunecke that an "Air Force Wide FOIA System outage" occurred, and as a result, the USAFA was unable to issue a final determination regarding the FOIA Appeal.

30. More than a year after submitting the FOIA Appeal, on October 5, 2018, Lt. Col. (Ret.) Bunecke received an email from Mr. Springs providing a partial response to the FOIA Appeal. Specifically, Mr. Springs generally asserted the USAFA's position that it had produced all non-exempt information to Lt. Col. (Ret.) Bunecke in response to the 2016 FOIA Request. Notwithstanding the partial response, Mr. Springs stated that the USAFA "estimate[s] responding to the remaining concerns of your appeal by 31 October 2018."

31. Months later, on December 12, 2018, the USAFA notified Lt. Col. (Ret.) Bunecke that the USAFA referred the FOIA Appeal to the Air Force Appellate Authority for review. The letter did not provide any basis or explanation as to why it was necessary for the USAFA to refer the FOIA Appeal to the Air Force Appellate Authority, or explain why this decision occurred nearly a year and a half after submission of the FOIA Appeal. A true and correct copy of the USAFA's December 12, 2018 letter is appended hereto as Exhibit G.

32. On January 4, 2019, Lt. Col. (Ret.) Bunecke submitted a request to the Air Force Appellate Authority concerning the status of the FOIA Appeal. The Air Force Appellate Authority did not respond to Lt. Col. (Ret.) Bunecke's inquiry. A true and correct copy of Lt. Col. (Ret.) Bunecke's January 4, 2019 letter is appended hereto as Exhibit H.

33. As of the date of this Complaint, the Air Force Appellate Authority has not provided a final determination in response to the FOIA Appeal in accordance with the statutory requirement under 5 U.S.C. § 552(a)(6)(A)(ii).

**COUNT I - FAILURE TO COMPLY WITH 5 U.S.C. § 552**

34. The allegations contained in Paragraphs 1-33 are incorporated as if fully set forth herein.

35. Pursuant to 5 U.S.C. § 552(a), Lt. Col. (Ret.) Bunecke has a statutory right to the disclosure of the agency records sought in the 2015 FOIA Request and the 2016 FOIA Request.

36. Lt. Col. (Ret.) Bunecke submitted proper FOIA requests to the USAFA and the USAF in accordance with 5 U.S.C. § 522(a)(3)(A), and complied with all applicable appeal deadlines required under 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

37. The USAFA and the USAF failed to comply with their disclosure obligations under FOIA within the statutory time limits prescribed by 5 U.S.C. §§ 552(a)(6)(A)(i)-(ii), including failing to issue a final determination regarding the FOIA Appeal.

38. The USAFA and the USAF failed to conduct a reasonable search for agency records responsive to the 2015 FOIA Request and the 2016 FOIA Request, violating the statutory requirement under 5 U.S.C. § 552(a)(3)(C).

39. The USAFA and the USAF failed to produce all relevant, non-exempt agency records responsive to the 2015 FOIA Request and the 2016 FOIA Request, violating the statutory requirement under 5 U.S.C. § 552(a)(3)(A).

**PRAYER FOR RELIEF**

WHEREFORE, Lt. Col. (Ret.) Bunecke requests that this Court enter judgment in his favor, and award the following relief:

a. Enjoin the USAFA and the USAF from withholding the requested agency records and order the USAFA and USAF to conduct a reasonable search and produce any withheld agency records in accordance with FOIA;

- b. Enjoin the USAFA and the USAF from assessing any search or reproduction fees to Lt. Col. (Ret.) Bunecke under FOIA;
- c. Provide for expeditious proceedings in this civil action;
- d. Award Lt. Col. (Ret.) Bunecke his costs and attorneys' fee reasonably incurred in this civil action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant any other and further relief the Court deems appropriate.

November 25, 2019

Respectfully submitted,

/s/ Shaun C. Kennedy

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